

JEWELL SCOTT, JR.

IBLA 85-43

Decided September 17, 1985

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, denying the protest of the second drawee for simultaneous oil and gas lease W-84980.

Affirmed.

1. Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases: Applications: Filing

A February 1983 BLM decision barring an oil and gas lease applicant from further participation in simultaneous drawings pending the payment of an alleged debt was not effective during the time the applicant had to appeal and the timely filing of a notice of appeal suspended the effect of the decision. Thereafter, when the second drawee for a parcel in the March 1983 drawing protests the selection of the barred applicant as first drawee, the protest is properly dismissed where the effect of the Board's ruling on the appeal was to remove the bar to participation.

APPEARANCES: Thomas E. Cahill, Esq., Cheyenne, Wyoming, for appellant; James A. Holtkamp, Esq., Salt Lake City, Utah, for first drawee, Frances Kunkel.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Jewell Scott, Jr., has appealed from the September 21, 1984, decision of the Wyoming State Office, Bureau of Land Management (BLM), denying Scott's protest to the issuance of noncompetitive oil and gas lease W-84980.

On March 16, 1983, Frances Kunkel filed simultaneous oil and gas lease applications for the March 1983 drawing. Kunkel's application for parcel WY-264 (Lease No. W-84980) was selected with first priority. Scott's application gained second priority for parcel WY-264. BLM forwarded lease offer forms to Kunkel. On June 30, 1983, BLM received the executed forms.

Subsequently, on August 27, 1984, Scott protested the issuance of lease W-84980 to Kunkel. Scott claimed that at the time Kunkel filed her application in March 1983, she was barred from participating in simultaneous filings because her January 1983 filings had been "rejected," and BLM had stated an intention to prevent her participation until she paid a debt alleged to be due the Government based on her January filings. Scott argued her application for WY-264 was invalid, and he should be awarded the lease.

On September 21, 1984, BLM denied Scott's protest citing the Board's May 8, 1984, decision in Frances Kunkel, 80 IBLA 333 (1984). That case involved Kunkel's January 1983 simultaneous filings which were accompanied by five checks upon which Kunkel stopped payment. By decision dated February 17, 1983, BLM disqualified those filings and barred her participation in future drawings until she paid the \$ 26,475 filing fees (plus a \$ 50 service fee). ^{1/} On March 28, 1983, Kunkel timely appealed that decision.

Kunkel stated on appeal that she had folded her applications and fearing that they might be invalid, she had stopped payment on her checks. The Board concluded at page 337:

We do not believe under the circumstances of this case that appellant should be penalized because she stopped payment on her checks. For the purposes of this decision, we will apply 43 CFR 3112.3(a)(3) (48 FR 33679 (July 22, 1983)), as amended, 49 FR 2113 (Jan. 18, 1984). Thus, we find that appellant's folded applications were unacceptable and that this finding of unacceptability controls the outcome of the appeal. The fact that the applications were accompanied by an unacceptable remittance is a secondary consideration which in this case is overridden by the unacceptable applications. [Footnote omitted.]

Scott filed a timely appeal of the denial of his protest in this case, charging that the regulations in effect at the time Kunkel made her March 1983 filings required her to pay the debt before she could participate. Further Scott argues that application of the revised regulations to relieve Kunkel of the necessity to pay her debt prior to participation should not have been applied because of his intervening rights as second drawee for parcel WY-264.

[1] Appellant's appeal has no merit. Appellant charges that Kunkel was barred from participation in the March 1983 drawing because of BLM's February 17, 1983, decision which, at the time she filed her March 1983 application, she had not appealed. Counsel for Kunkel correctly points out that appellant overlooks the effect of 43 CFR 4.21(a). That regulation provides:

^{1/} Subsequently, by letter dated Apr. 21, 1983, BLM informed Kunkel that she was due a refund because certain parcels had been deleted for the January 1983 filing period. BLM offset the refund against the amount owing and informed Kunkel she owed, including interest, \$ 25,203.32. On May 23, 1983, she paid that amount under protest.

(a) Effect of decision pending appeal. Except as otherwise provided by law or other pertinent regulation, a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. However, when the public interest requires, the Director or an Appeals Board may provide that a decision or any part of it shall be in full force and effect immediately. [Italics in original.]

Since a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, it is irrelevant that Kunkel had not appealed at the time she filed her March 1983 applications, because those filings took place during the time in which she could have filed an appeal. Likewise, the timely filing of her notice of appeal suspended the effect of BLM's February 17, 1983, decision. See David A. Provinse, 33 IBLA 312 (1978). The Board's subsequent decision in Frances Kunkel, *supra*, concluded that the folded applications were unacceptable, that, in effect, the filing fees were not a debt due and owing the Government and that Kunkel was entitled to a refund of filing fees minus a \$ 75 processing fee for each of her five applications. Thus, the participation prohibition was at no time effective and clearly did not bar Kunkel's participation in the March 1983 drawing. Kunkel's application for WY-264 was not void. As first drawee, all else being regular, she is entitled to lease W-84980.

Appellant's arguments in this appeal are, in essence, an attack on our decision in Kunkel. Appellant asserts that BLM should have applied the regulations in effect in January 1983 to bar Kunkel's participation. This Board, however, found that subsequently promulgated regulations could be applied in that case. BLM correctly observed in its decision denying Scott's protest: "The effect of the Board's decision in Kunkel is to validate the applicant's March 1983 and subsequent filings. This office is entirely bound by the Board's decision." To the extent appellant may be seeking to have the Board reconsider its decision in Kunkel, we decline to do so and adhere to our rulings therein. Moreover, since 30 U.S.C. § 226-2 (1982) requires that any action "contesting a decision of the Secretary involving any oil and gas lease" must be brought within 90 days of the decision, appellant is barred by statute from relitigating this matter.

A further argument advanced by appellant is his contention that application of the amended regulation by the Board in Kunkel prejudiced his "intervening" rights. In Kunkel in applying 43 CFR 3112.(a)(3) (1984), the Board observed at page 337, n.4:

Under longstanding Departmental practice, in the absence of third-party rights or countervailing considerations of public policy, amended regulations may be applied to matters pending before the Board where such amended regulations will benefit an appellant. See James E. Strong, 45 IBLA 386 (1980); Henry Offe, 64 I.D. 52 (1957).

Appellant does not allege that he was an applicant in the January 1983 drawing. His only claim is that he was the second drawee in the March 1983

drawing for WY-264. While our decision in Kunkel clearly had the effect of validating Kunkel's March 1983 filings, we do not find Scott's status as second drawee therein to be relevant to consideration of whether there were intervening rights which would have prohibited imposition of the amended regulations in Kunkel. In the context of simultaneous oil and gas leasing, intervening rights have generally been associated with those receiving subsidiary priority in the same drawing. See Ballard E. Spencer Trust, Inc., 18 IBLA 25 (1974), aff'd, Ballard E. Spencer Trust, Inc. v. Morton, 544 F.2d 1067 (10th Cir. 1976).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Bruce R. Harris
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

James L. Burski
Administrative Judge

